IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MSOFFE, J.A., KILEO, J.A., And ORIYO, J.A.)

CRIMINAL APPEAL NO. 263 OF 2007

VITALIS BERNARD KITALE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the Principal Resident Magistrate Court of Moshi at Moshi)

(Mgaya, PRM. Extended Jur.)

dated the 30th day of April, 2007
in
Criminal Appeal No. 37 of 2007

JUDGMENT OF THE COURT

1st & 6th September, 2010

ORIYO, J.A.:

In the District Court of Moshi, the appellant Vitalis Bernard Kitale was jointly charged with Silvano William @ Kipepe (1st accused), Rogasian Kalist @ Rojaa (2nd accused), Flora Gabriel (3rd accused), Henry John (4th accused), and Diory Haji (5th accused) with the offence of Armed Robbery contrary to Section 287A of the Penal Code, Cap 16, R.E 2002. The appellant was the 6th accused.

They denied having committed the offence.

The charges against the second, fourth and fifth accused persons were withdrawn under section 98 of the Criminal Procedure Act and the accused accordingly discharged in terms of section 230 of the Criminal Procedure Act, Cap 20, R.E. 2002. At the end of the trial, the third accused, Flora Gabriel was acquitted under section 235 of the Criminal Procedure Act. The first accused, Silvano William @ Kipepe and the appellant, Vitalis Bernard Kitale (sixth accused), were convicted as charged and sentenced to thirty (30) years imprisonment. The appellant and Silvano William @ Kipepe were aggrieved. They appealed to the High Court at Moshi against conviction and sentence. The appeal to the High Court was transferred to and heard by F.W. Mgaya, Principal Resident Magistrate with extended jurisdiction (as she then was), in terms of section 45(2) of the Magistrates' Courts Act No. 2 of 1984, as amended. While the appeal by Silvano William @ Kipepe was allowed, that of the appellant was dismissed. Still aggrieved the appellant has preferred this second appeal.

The brief facts of the case are that on 13/12/2004, at about 22.00 hours the complainant, (PW1) Selestin Elias Malisa and his wife returned

home. Immediately upon entering the gate into their compound, PW1, was ambushed from behind by a group of bandits; their number was not ascertained (ranges between 2-4 people). Among the bandits, one was armed with a shotgun while the rest had bush knives and clubs (rungu). They demanded money from PW1. As the money was not forthcoming, they fired shots in the air, assaulted PW1 severely by cutting him with the bush knife, kicked him in the mouth, etc. The assault resulted into PW1 losing 6 teeth and eventually he became unconscious in the process. The bandits then entered PW1's house, ransacked and took away various items including cash, mobile phone, wedding rings, etc. PW1 was taken to hospital where he was admitted until on 17/12/2004 when he was discharged.

In this Court, the appellant filed over ten grounds of appeal. The grounds of appeal are contained in a Petition of Appeal and Additional grounds were presented at the hearing, with the leave of the Court. From the totality of his grounds of appeal, the main complaint raised relates to the identification of the appellant at the scene of the incident.

Before us, Mr. Prosper Rwegerera, learned State Attorney appeared on behalf of the respondent Republic. The appellant appeared in person.

The appellant's appeal found support from the respondent Republic. Responding to the ground on identification, Mr. Rwegerera, learned State Attorney submitted that PW2 was the sole witness who testified to have identified the appellant at the scene. Describing the conditions at the scene he said that the incident took place in the night, about 22.00 hours in which case the conditions for identification were not favourable. Further the learned State Attorney stated that the complainant, PW2 was ambushed from behind and could not see the assailants immediately; even their number was not ascertained. And though PW2 testified to have identified the appellant at the scene because he was known to him before the incident; the witness had also stated that all the assaillants had worn coats, without describing their colour, length, etc. The learned State Attorney submitted that the possibility of mistaken identification of the appellant is strengthened when one takes into account the fact that PW2 had fallen unconscious at the scene.

Talking of the short time that the incident took, Mr. Rwegerera submitted that it was insufficient for PW2 to identify the appellant before he lost consciousness.

We agree with the learned State Attorney that the central issue for determination in this appeal is whether the appellant was properly identified. From the evidence, it is undisputed that PW1 was the sole witness on visual identification of the appellant at the scene. He said there was light from a tubelight at the scene, though the intensity and the distance of such light is not known. As stated by the learned State Attorney, the incident took a very short time to accomplish and PW2 fell unconscious at the scene. He only came around on the way to the hospital.

It is common ground that PW2 was attacked by a group of bandits; their number was not ascertained. In such a situation, positive evidence of identification of the attackers is necessary; otherwise the risk of mistaken identity cannot be ruled out.

In this case, PW2 stated that he identified the appellant because he knew him prior to that date. We do not think that knowing the appellant alone was sufficient. There should have been more concrete detailed description of the appellant. The witness should have given a description of the appellant as he saw him at the time of the incident.

The need for a witness to describe the identity of the accused in detail was underscored in the case of **Mohamed Alhui vs Rex** (1942) 9 E.A.C.A72 where the Court of Appeal for Eastern Africa held: -

> *"in every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description given are matters of which evidence ought always to be given: first of all, of course, by the persons who gave the description and purport to identify the accused, and then by the person or person to whom the description was given."*

Applying these principles to the instant case, it cannot safely be said that the conditions for the identification of the appellant at the scene were favourable. We think it would be unsafe to sustain the conviction based on such unsatisfactory evidence of identification of the appellant.

It is for these critical deficiencies in the prosecution case on the evidence of identification of the appellant that we find ourselves constrained to allow the appeal. Accordingly we quash the conviction and set aside the sentence. The appellant is to be released from prison forthwith unless otherwise lawfully held.

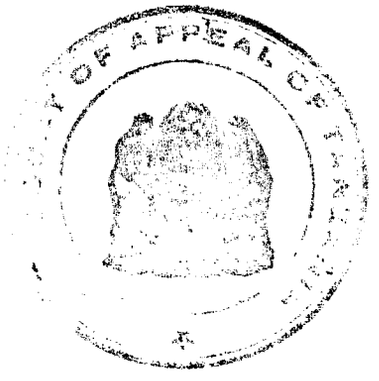
DATED at **ARUSHA** this 6th day of September, 2010.

J. H. MSOFFE
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



(E. Y. MKWIZU)
DEPUTY REGISTRAR
COURT OF APPEAL